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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUAN RIVERA, 94-B-2486,
a/k/a RICARDO S. DEJESUS,

Petitioner,

-v-

09-CV-6048Fe

WALTER KELLY,

ORDER

Respondent.

On January 30, 2009, the papers transferred here from the U.S. Court of Appeals for the second Circuit were filed as a *pro se* petition from Juan A. Rivera, a/k/a Ricardo S. DeJesus, an inmate of a state correctional facility, seeking relief under 28 U.S.C. § 2254 with respect to a judgment of conviction in Erie County, New York. Petitioner had filed an Application for Leave to File a Second or Successive Petition in the Second Circuit, regarding a conviction entered on September 6, 1994 on two counts of attempted murder, three counts of attempted robbery and criminal possession of a weapon. The petition was transferred here because Petitioner did not provide any indication that he had filed a prior petition.

Upon review of the Court's records and case law, Petitioner had filed a prior § 2254 petition in the Western District: DeJesus (a/k/a Rivera) v. Kelly, Civil Docket No. 99-CV-80H (W.D.N.Y. 1999).

The earlier petition addressed the 1994 Erie County conviction which was affirmed by the New York State Supreme Court, Appellate Division, Fourth Department, at People v. De Jesus, 236 A.D.2d 791, 656 N.Y.S.2d 978 (4th Dept. 1997). In the earlier petition, Petitioner raised claims regarding the identification of petitioner, the Jury Charge, and prosecution's remarks. Magistrate Judge Heckman denied habeas relief September 30, 1999.

In 2007, petitioner appealed from the denial of a state court motion seeking to vacate the conviction pursuant to CPL 440.10(1)(h) based on an ineffective assistance of counsel claim. The appeal was denied on April 20, 2007, People v. De Jesus, 39 A.D.3d 1196, 835 N.Y.S.2d 792 (4th Dept. 2007). Following that collateral attack, Petitioner submitted his papers to the Second Circuit. Thus, this is petitioner's second or successive petition with respect to the same judgment of conviction.

According to 28 U.S.C. § 2244, before a district court may entertain a second or successive application for a writ of habeas corpus filed pursuant to § 2254, the petitioner must have first requested and obtained an order from the appropriate court of appeals which authorizes the filing of such a second or successive petition. The petition herein has not been so authorized. Therefore, in the interests of justice and pursuant to 28 U.S.C. § 1631, this petition shall be transferred to the Second Circuit

Court of Appeals for a determination of the authorization issue.

See Liriano v. United States of America, 95 F.3d 119 (1996).

IT HEREBY IS ORDERED, that the petitioner's § 2254 petition is transferred to the Second Circuit Court of Appeals.

SO ORDERED.

s/Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

Dated: February 12, 2009
Rochester, New York